Nos. 77-753 and 77-754

In the Supreme Court of the United States

OCTOBER TERM, 1977

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS PEICK,
Petitioners,

vs.

JOHN DANIEL,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT JOHN DANIEL IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI

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The Court of Appeals for the Seventh Circuit has unanimously affirmed the decision of the United States District Court for the Northern District of Illinois, Eastern Division, denying petitioners' motions to dismiss the Complaint. Respondent John Daniel opposes the issuance of a writ of certiorari to review the decision of the Seventh Circuit because of the lack of any conflict with other courts of appeal, the interlocutory nature of the judgment below, and the fact that the decision below was clearly correct and consistent with the statutory language and the applicable case law.

OPINIONS BELOW

The opinion of the district court (Pet. Local 705 App. pp. 55-80) is reported at 410 F. Supp. 541. The opinion of the Court of Appeals for the Seventh Circuit (Pet. Local 705 App. pp. 1-53) is reported at 561 F.2d 1223.[1]

QUESTION PRESENTED

The question presented in the petitions for writs of certiorari is whether plaintiff's interest in the Local 705 Pension Fund constitutes a "security" acquired by way of a "sale", as those terms are defined in the Securities Act of 1933 (the "1933 Act") and the Securities Exchange Act of 1934 (the "1934 Act"), for the sole purpose of applying the antifraud provisions of the federal securities laws?

STATEMENT OF THE CASE

A. Plaintiff's Claim.

The plaintiff, John Daniel, has brought this lawsuit to seek relief for certain fraudulent and illegal activities undertaken by defendants in connection with the sale of interests in the Local 705 International Brotherhood of Teamsters Pension Fund (the "Local 705 Pension Fund"). The defendants include the IBT, Local 705, the Local 705 Pension Fund, and the officers of Local 705 and trustees of the Local 705 Pension Fund. The only claims in issue on this interlocutory appeal involve Counts I and II of the Complaint relating to violations of the antifraud provisions of the federal securities laws.

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[1] Petitioners Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, and Louis F. Peick will hereinafter be referred to as "Local 705" and their petition for writ of certiorari and appendix as "Pet. Local 705" and "Pet. Local 705 App." respectively. Petitioner International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America will hereinafter be referred to as "IBT" and its petition for a writ of certiorari as "Pet. IBT". The appendix filed by Petitioners in the Court of Appeals will hereinafter be referred to as "C.A. App."

Counts I and II seek relief for defendants' fraudulent and intentional misrepresentations and omissions of material fact relating to the sale to plaintiff of interests in the Local 705 Pension Fund, all in violation of Section 17(a) of the Securities Act of 1933 (the 1933 Act), 15 U.S.C. §77a-77aa, and Section 10(b), and Rule 10b-5 thereunder, of the Securities Exchange Act of 1934 (the 1934 Act), 15 U.S.C. §78a-78jj, and 17 C.F.R. §240.10(b)-5.

B. The Plaintiff.[2]

The plaintiff, John Daniel, invested in the Local 705 Pension Fund over the period from 1955 through November, 1973, and his investment is now *worthless*. Local 705 established the multi-employer Local 705 Pension Fund as of January 1, 1955. Pursuant to the terms of the labor contracts negotiated by Local 705, part of the consideration received by Daniel and all other Local 705 members for labor services provided to Local 705 covered employers has been invested into the Local 705 Pension Fund.[3] These investments were made, pursuant to such contracts, directly

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[2] See generally the affidavit of Respondent, John Daniel, which is reproduced in Respondent's Appendix (hereinafter referred to as "R. App.").

[3] The investments by Local 705 union members into the Local 705 Pension Fund are substantial. Thus, a member of Local 705 invests $24 per week, or $1,248 per year, through employer contributions into the Local 705 Pension Fund. A. S. Hensen, Inc., Affidavit, p. 11; C.A. App. 185a p. 11. The aggregate value of all such monies invested by a Local 705 member over his trucking career are likely to be very large. Indeed, this investment is probably the largest investment a union member will ever make in his lifetime, "exceeding in value the owner-occupied single-family home, as well as the automobile." Drucker, *The Unseen Revolution*, p. 43 (1976). The aggregate value of all monies invested by Local 705 members in the Local 705 Pension Fund totals over $91 million. A. S. Hansen, Inc., Affidavit, p. 8; C.A. App. 185a p. 8.

into the Local 705 Pension Fund on behalf of such Local 705 union members by their employers as part consideration for labor services provided. The monies so invested into the Local 705 Pension Fund have been held in trust and invested and managed by Local 705 Pension Fund trustees for the benefit of all such Local 705 members who have invested in the Fund.

Daniel worked for Local 705 covered employers for a period of 22½ *consecutive years* and was denied a pension from the Local 705 Pension Fund. He first became a member of Local 705 in April, 1950, and at the same time entered into employment as a truck driver with an employer who had a labor contract with Local 705. Until his retirement at age 63 on account of poor vision, he only worked as a truck driver for employers who were under collective bargaining agreements with Local 705. Daniel has not worked at all since his retirement on December 1, 1973.

Over the whole 22½ year period of his employment career with Local 705 covered employers, Daniel's *sole* absence was a forced four month absence due to an economic lay off from his job. Although this brief absence was strictly involuntary, Local 705 has seized upon it to deny Daniel a pension for not complying with its 20 year *continuous* service vesting rule,[4] notwithstanding his admitted 22½ years of service.

The establishment of the Local 705 Pension Fund was an important element in Daniel's decision to continue working

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[4] Presumably, under the Local 705 Pension Fund continuity requirement, a Local 705 union member whose 20 years of covered service from 1955 to 1975 was interrupted by a 1 month, or even a 1 day, break in service in 1965, would be denied a retirement benefit from the Local 705 Pension Fund. This Draconian result befell plaintiff here: John Daniel was denied a pension benefit, notwithstanding his total 22½ years of covered service, because of a 4 month involuntary break-in-service in 1960.

with Local 705 covered employers.[5] Daniel understood the Local 705 Pension Fund to insure the financial security of his old age. He recognized that he would be investing in the Local 705 Pension Fund through contributions made on his behalf into the Fund by his covered employers as part of his compensation for labor services performed; and that these contributions (together with the profits earned thereon) would, in part, finance the pension benefits he counted on receiving after retirement.[6] Indeed, the economic inducements to Daniel to invest in the Local 705 Pension Fund were substantial.[7] As a result, Daniel and the other members of Local 705 consistently voted in favor of collective bargaining agreements which provided for employer contributions on their behalf into the Local 705 Pension Fund in lieu of additional direct cash wage increases.

Daniel learned of the Local 705 Pension Fund only through mailings from and other communications with the Fund itself, the trustees of the Fund, Local 705, and the officers of Local 705. However, these communications intentionally misrepresented and failed to disclose certain material facts pertaining to the value of an interest in the Local 705 Pension Fund. For example, such materials did not disclose the minimum length of time considered to con-

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[5] Daniel Affidavit Para. 7; R. App. p. 3.

[6] *Id.* Para. 6; R. App. pp. 2-3.

[7] *Id.* Para. 9-10; R. App. pp. 4-5. In fact, the economic pay off promised from a Teamster pension fund is a key selling point used both by an employer to convince an employee to enter into employment and by the IBT and its various affiliate unions to convince an employee to certify a Teamsters union as his exclusive representative in labor negotiations. For example, articles in the first eight issues of the 1976 edition of *International Teamsters* (the union's magazine) were devoted to the Teamster pension plans. Further, a Federal Mediation and Conciliation Service Study concluded that pensions were second only to cash wages as a determinate of employee decisions. Simkin, Union Membership Rejection of Contract Settlements, *Labor Relations Yearbook*, pp. 334, 342 (1967).

stitute a break-in-service in the Local 705 Pension Fund 20 years continuous service vesting rule; such materials did not disclose that all contributions made on behalf of a Local 705 member into the Local 705 Pension Fund (and all accumulated profits on the aggregate of such contributions) would be forfeited following any proscribed break in service; such materials did not disclose that service credit in one Teamster pension fund would not count toward service credit in most of the other 229 teamster pension funds; and such materials did not disclose the fact that very few Local 705 members would ever receive a pension benefit.[8]

The importance of such information is revealed by a recent statistical survey of employee pension plans which concludes that *fewer* than 10 percent of all participants in those plans which require 11 or more years of service for vesting will ever receive any pension benefits.[9] Interim Report on the Activities of the Private Welfare & Pension Plan Study, Senate Committee on Labor and Public Welfare, S. Rep. No. 92-634, 92d Cong., 2d Sess. 15, 115-153 1972) (hereinafter referred to as *Senate Pension Study*). A more material fact relating to the value of an interest in an employee pension plan could not be imagined.[10]

Finally, such materials do not disclose the success or failure of the Local 705 Pension Fund trustees in managing

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[8] Daniel Affidavit Para. 11 and 12; R. App. p. 5.

[9] See Pet. Local 75 App. p. 8.

[10] If only 10 percent of the Local 705 members participating in the Local 705 Pension Fund ever receive any pension benefits, the question arises as to who benefits from the forfeitures resulting from the unlucky 90 percent. A clue to the answer of this question may be found in a recent study of the Teamster unions. PROD, *Teamster Democracy and Financial Responsibility*, pp. 81-89 (1976). However, any real effort to uncover the basic facts relating to the operation of Teamster pension funds has been thwarted by the chilling effect of Teamster violence. See A. A. Raskin, "Can Anybody Clean Up The Teamsters," *N.Y. Times Mag.*, Nov. 7, 1976.

the monies in the Fund and the type of investments in which such monies are placed.[11] This information is vital because the performance of the Fund affects the economic return to a participant on his investment. Higher performance will ultimately lead to larger retirements benefits, and poor performance underscores the risk of loss of a participant's investment.

In brief, plaintiff John Daniel was induced to invest substantial value into the Local 705 Pension Fund by defendants' intentional misrepresentations of material facts and omissions to state other material facts relating to the value of plaintiff's investment. Daniel was induced to invest on the promise of substantial economic profits. While misrepresenting the profits to be made, the defendants also failed to set out, or even mention, the substantial risks of loss. As a result of defendants' securities fraud, Daniel's investment into the Local 705 Pension Fund is worthless.

C. The Plaintiff's Investment Vehicle.

The interest of the plaintiff in the Local 705 Pension Fund is indistinguishable from an interest in a mutual fund acquired through a periodic investment plan. This has been recognized by the SEC for over 35 years:

> "In fact, many employee plans are in the nature of investment trusts and are indistinguishable in legal effect from investment companies offering securities to the public at large." Testimony of then SEC Commissioner Purcell in Hearings on Proposed Amendments to the 1933 and 1934 Acts before the House Comm. on Interstate and For. Commerce, 77th Cong., 14 Sess., at 895-96 (1941) (the *1941 Hearings*).

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[11] Daniel Affdavit Para. 12; R. App. p. 5. The recently authorized Department of Justice criminal investigation into the management of various Teamster pension funds suggests that these monies have been unlawfully diverted from their proper purposes. See generally PROD, *Teamster Democracy and Financial Responsibility*. (1976).

Moreover, plaintiff's interest in the Local 705 Pension Fund constitutes his sole investment vehicle in the American capital markets. This is no longer unusual. Private employee pension plans, such as the Local 705 Pension Fund, are today the primary investment vehicle for most working Americans:

> "In 1940, an estimated four million employees were covered by private pensions; in 1950, the figure had more than doubled to 9.8 million; in 1960, over 21 million employees were covered; and in 1973, approximately *30 million workers participated.* Currently, *one-half* of the industrial work force in the United States are members and participants of private pension plans. It is projected that by 1984, 42.3 million workers will be covered by private pension plans. The growth of the assets owned or controlled by pension funds has closely paralleled this expansive growth. Total estimated assets of pension plans have accelerated from $2.4 billion in 1940 to *$150 billion in 1973* and are increasing at a rate projected to exceed $250 billion by 1980." S. Rep. No. 93-127, 93rd Cong., 2d Sess. 2-3 (1973). (Emphasis added)

Further, private non-insured pension funds are now the largest investors in the American capital markets. At the end of 1972, they held 11% in value of *all* New York Stock Exchange listed stocks, and in 1972 they accounted for over 23% of the dollar value of all shares traded on the New York Stock Exchange. New York Stock Exchange, *1973 Fact Book* pp. 51-52, 75 (1973).

One highly informed commentator has characterized this profound change as "The Unseen Revolution", noting that the investment by a fund participant in an employee pension plan is likely to be "the largest single asset for the middle aged American family." Drucker, *The Unseen Revolution,* p. 43 (1976); see n. 3, *supra.* However, "Unseen" or seen, what 35 years ago was perhaps a novel way of investing is now widely spread. No reason appears,

moreover, why working Americans should be excluded from the protection of the antifraud rules because of the form of their investment vehicle.[12] As the court of appeals has noted below (Pet. Local 705 App. p. 33):

> "Because employee pension plans are now the major, if not sole, form of investment for most American workers to provide for their old age and because of the now crucial role that such plans play in today's capital markets, they are just the sort of investment vehicle that the securities acts were passed to regulate. To proclaim that the securities laws encompass securities consisting of interests in pension plans is 'quite consistent with the congressional enactment and with the role of the federal judiciary in interpreting it * * *.' *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 737, . . . The type of fraud allegedly perpetrated on the plaintiff is among those the securities laws were passed to prevent and remedy."

Thus, the appropriate inquiry should not be "whether" employee pension plan securities are included, but rather "why" as a vital investment vehicle should they be excluded from the protection of the antifraud provisions of the federal securities laws. Other federal statutes are not designed to remedy the type of securities fraud present here.

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[12] The general counsel for the SEC thus stated on oral argument below:

> "The real issue . . . before this Court, is whether there can ever be any set of facts which would give rise to a cause of action under the Anti-Fraud provisions of the Federal Securities Laws for fraud and misrepresentation in the inducement of entering into a pension fund plan. This is the sole issue . . . before this Court . . . whether [under] allegations of . . . lying, stealing and cheating, [the] anti-fraud provision[s] can ever be applicable to an interest in a pension fund. We assert that they can." Transcript pp. 33-35.

D. The Course of Proceedings in the Court of Appeals

The Court of Appeals for the Seventh Circuit on interlocutory review unanimously affirmed the decision of the district court below denying petitioners' various motions to dismiss Counts I and II of plaintiff's Complaint. In holding that plaintiff's interest in the Local 705 Pension Fund was a "security" acquired by way of a "sale" for the purposes of the antifraud rules of the federal securities laws, the court of appeals employed a "modality of analysis" stressing in order of attention the statutory language, the legislative history, Securities and Exchange Commission ("SEC") administrative interpretation, and economic reality and policy considerations. Pet. Local 705 App. p. 9. See generally *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 212-14 (1976).

1. Noting that the statutory definition of "security" in both the 1933 and 1934 Acts includes an "investment contract," the court applied the definition of "investment contract" as set out in *SEC* v. *W. J. Howey Company,* 328 U.S. 293, 298-99 (1946), and reiterated in *United Housing Foundation, Inc.* v. *Forman,* 421 U.S. 837, 852 (1975), to conclude that plaintiff's interest in the Local 705 Pension Fund was a security. The first element of the *Howey* test, that there be an investment of value,

> "requires that the employer-paid contributions to the pension fund . . . be properly considered to be economic compensation to the employee. This proposition is *universally accepted by the courts and commentators.* Accordingly, the investment of money prong of the *Howey* rule has been satisfied." Pet. Local 705 App. p. 16-17.[13] (emphasis added).

The second element of the *Howey* test, the presence of a common enterprise, is found in the Local 705 Pension Fund.

[13] Indeed, even petitioner IBT has conceded in its brief to the court of appeals that Daniel's investment in the Local 705 Pension Fund "constitutes a form of compensation for employee's labor." IBT Brief, p. 12.

And, the third element, profits from the efforts of others is also present both in the form of a

> ". . . traditional return on the pension fund participant's investment, *a dollar-profit element* in the form of capital gains, interest, dividends, and other accumulated earnings realized from the trustee's management of the pension fund." *Id.* at 19. (emphasis added).

and by virtue of the fact that

> "It is conceded that the expected payout to a beneficiary will [otherwise] exceed the contributions made by the employer on the employee's behalf (the union member's investment). The resulting gain would commonly be termed a profit. . . . [Indeed, it] is precisely this promise of retirement benefits far in excess of the pensioner's investment that forms the economic inducement to invest in a pension fund." *Id.* at 18-19.[14]

2. Having determined that under the *Howey* test an interest in the Local 705 Pension Fund is a security, the court found support for its conclusion from an analysis of both the legislative history and SEC interpretation. For example, the court noted that a proposed 1934 amendment—which would exempt from the 1933 Act registration requirements "an offering made . . . in connection with a bona fide plan for the payment of extra compensation" to employees—was eliminated in conference because of the need of such employees for the protection provided by registration mandated disclosure. Pet. Local 705 App. p. 24-27. That Congress thus considered interests in employee pension plans as securities (not automatically exempt from registration) was confirmed some seven years later by then

[14] Not only do defendants "not contest that whatever is expected from the common venture will be solely derived from the efforts of persons other than the venture's investors," Pet. Local 705 App. p. 17 n.21, but also "even defendants concede [a substantial part of Daniel's gain equal to] at least 25% . . . will derive from traditional [forms of] return." *Id.* at 19.

SEC Commissioner Purcell, who in commenting on the proposed 1934 amendment stated:

> With this clear statement of Congress before it, the Commission certainly had no alternative but to interpret the act as applying to employee's plans which involve the sale of a security . . . *Any plan under which employees are given the opportunity to place part of their earnings in a fund which is to be invested for their benefit and returned to them at a later date involves the offering of an "investment contract". 1941 Hearings* (emphasis added).

More importantly, the court noted that Congress as recently as the Investment Companies Amendments Act of 1970 recognized that interests in pension funds are securities, and codified a long standing administrative practice of the SEC by exempting such interests from the registration requirements of Section 5 of the 1933 Act. Pet. Local 705 App. p. 28 et seq. Finally, the court noted that:

> "Professors Mundheim and Henderson have characterized the SEC's interpretation of 'security' . . . as including an interest in employee pension plans *as that 'traditionally taken.'*" *Id.* at 27. (emphasis added)

3. In the next step of its analysis, the court found that its conclusion resulting from an analysis of the statute, the legislative history, and SEC interpretation—that an interest in the Local 705 Pension Fund is a security—was consistent with both economic reality and the policy considerations underlying the federal securities laws. Analogizing an interest in the Local 705 Pension Fund to an interest in both a mutual fund and a variable annuity contract, *SEC* v. *Variable Annuity Life Insurance Co.*, 359 U.S. 65 (1959) (*"VALIC"*), *SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202 (1967), the court stressed:

> "If the sole investment vehicles for tens of millions of Americans which in the aggregate control a quarter or more of the entire capital market are exempt from the anti-fraud provisions of the securities laws, then policing of the capital markets is significantly neutralized." Pet. Local 705 App. p. 24.

4. Having determined that an interest in the Local 705 Pension Fund is a security,[15] the court next concluded that the plaintiff acquired such security by way of a "sale," because there was a "disposition for value" or "other disposition" of such security as the statutory definitions of sale in the 1933 and 1934 Acts, respectively, require. Certainly, because plaintiff has acquired an interest in the Local 705 Pension Fund, the court noted "there necessarily has been a disposition of a security to plaintiff within the scope of the two Acts." *Id.* at 34. Furthermore, "plaintiff's giving of his services and the employer's contribution on behalf of the employee constitutes value, thereby meeting the 'for value' requirement." *Id.* at 35. Although the court noted that

> "the definitions of sale in the 1933 and 1934 Acts do not require volition . . . [i]n any case, volition is present to the extent that Local 705 members voted whether or not to accept the collective bargaining contract containing this pension fund and whether to ratify subsequent agreements governing the level of employer contributions into the fund or seek dismissal of union officers or the unlikely radical measure of decertification of the Union." *Id.* at 36.

5. Finally, citing the standard for pre-emption set out in *Gordon* v. *New York Stock Exchange*, 422 U.S. 659, 682-83 (1975), the court concluded that the antifraud provisions of the federal securities laws had not been pre-empted by the Employee Retirement Income Security Act of 1974 ("ERISA"). Pet. Local 705 App. p. 42 et seq. Indeed,

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[15] Petitioner IBT has itself conceded the presence of a "security" in the context of this case. Thus, petitioner IBT stated in its Reply Brief in Support of its Motion To Dismiss (filed Feb. 27, 1975):

> "Much of Plaintiff's argument is devoted to the proposition that interest in an employee pension plan may be 'securities' under the Federal securities laws. *This is not disputed by IBT.*" *Id.* at p. 1. (emphasis added).

See Pet. Local 705 App. p. 15, n.18.

Section 514(d) of ERISA specifically saves *all other federal legislation*[16] and Section 514(b)(2)(A) of ERISA even specifically saves *all state securities laws.*[17] Further, defendants' confusion of the requirements of the 1933 Act's registration provisions with the antifraud provisions of the

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[16] Section 514(d) of ERISA specifically repeals only the Welfare and Pension Plans Disclosure Act of 1958 (and certain provisions of Title 5 of the U.S. Code relating to administrative procedure) and *specifically saves* all other legislation:

> "Nothing in [ERISA] . . . shall be construed to alter, amend, modify, impair, or supersede, any law of the United States . . . or any rule or regulation issued under any such law."

[17] Section 514(b)(2)(A) states:

> "Nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates . . . securities."

Most state securities laws consider interests in pension funds to be securities. For example, the Illinois Securities Law of 1953 definition of "security" is for our purposes identical to that found in the federal securities laws. Ill. Rev. Stat. Ch. 121½, Section 137.2-1. That it includes interests in employee pension plans is made clear by the exemption of such "securities issued by or pursuant to . . . employee pension trusts or plans" from the registration requirements. Ill. Rev. Stat. Ch. 121½, Section 137.3-0. A similar definition of "security" and exemption from registration for "any investment contract issued in connection with an employees' . . . pension . . . plan" is found in the Uniform Securities Act, 7 Uniform Laws Ann., Uniform Securities Act §§501(1) and 402(a)(11) (1970), which has been adopted in 32 jurisdictions. *Id.* at Cum. Annual Pocket Part 342 (1976). Of course, the relevance of what is considered a "security" under state law to the definition of "security" under the federal securities laws is demonstrated by the approval by this Court in *SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202, 211-212 (1967), of Professor Loss' statement:

> At the state level the Uniform Securities Act makes explicit what seems to be the view of the great majority of blue sky administrators to the effect that variable annuities are securities. 1 Loss, *Securities Regulation* 499.

1933 and 1934 Acts constitutes "defendants' quintessential error." *Id.* at 44.[18]

> "The registration provisions are designed to assure that investors will be furnished with all material information concerning an informed investment decision. The mechanism to implement this objective includes filing of a registration statement and the delivery of a prospectus containing detailed information about the security and its issuer. In contradistinction, the antifraud provisions do not establish an affirmative disclosure system requiring the filing of documents. Rather the anti-fraud provisions are essentially a generalized self-executing prohibition against fraudulent activity." *Id.*

Noting that the requirements of ERISA differ from the requirements of the antifraud rules, the court thus concludes that "Reading the anti-fraud provisions of the securities laws to be complementary to the requirements of ERISA makes good sense." *Id.* at 46.

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[18] The court of appeals has thus noted that "the defendants concede that certain voluntary and contributory pension plans are subject to both the securities laws' registration requirement and ERISA (Rep. Br. 206). The securities laws have not torpedoed such plans. This seems to follow from the continuing registration of such plans. In fact, the disclosure requirements are becoming complementary as the SEC in its revisions of Form S-8 attempts to avoid duplication of, but not defer to the ERISA requirements." *Id.* at 45 n.54.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

The unanimous decision of the Seventh Circuit Court of Appeals holding plaintiff's investment in the Local 705 Pension Fund to be a "security" acquired by way of a "sale" pursuant to the antifraud provisions of the federal securities laws is clearly correct and should not be upset. It is soundly based on statutory analysis, legislative history, administrative interpretation, judicial precedent, and public policy. It is not the type of decision for which this Court normally exercises its certiorari jurisdiction. Indeed, it is for this reason that petitioners have filed confusing petitions of great length in their search for reasons to grant the writ. However, the petitions do not establish any of those reasons set out in Supreme Court Rule 19(1)(b) as the type of considerations governing review on certiorari. Surprisingly, neither do the petitions examine the logical application of the *Howey* rule to the plaintiff's investment in the Local 705 Pension Fund.

Three reasons may be distilled from the petitions as to why a writ of certiorari should issue. First, in a rather desultory fashion petitioners argue that the decision below is incorrect. Because of the strong foundations of the opinion, petitioners' effort to undermine it are *not* directed to the statutory language or to the six Supreme Court decisions[19] interpreting the definition of "security." In-

[19] The issue of what constitutes a security under the federal securities laws has been the subject of six decisions by the Supreme Court, all of which have applied the definition of security broadly and five of which have held a security to be present:

(1) *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344 (1943), holding an oil exploration program offered together with a land lease to be a security;

(2) *SEC* v. *W. J. Howey Co.*, 328 U.S. 293 (1946), holding

(footnote continued)

deed, as the court of appeals has noted, see n.15 *supra*, even petitioner IBT itself has conceded the presence of a "security" in the context of this case. The definition of an investment contract was set out by this Court in *SEC* v. *W. J. Howey Co.*, 328 U.S. 293, 298-99 (1945), and reaffirmed in *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 852 (1975). After an exhaustive analysis, the court of appeals has concluded that all elements of the *Howey* rule are present here. This conclusion is consistent with the prior six Supreme Court decisions. Because the principles established in *Howey* and re-affirmed in *Forman* were applied here, there is no need for Supreme Court review. This is not a case where improper principles have been applied. It is merely one of many where a par-

(footnote continued)

a land sales contract for an orange grove accompanied by a service contract on the maintenance and harvesting of the orange trees to be a security;

(3) *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959), holding a variable annuity insurance contract to be a security;

(4) *SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202 (1967), holding a variable annuity contract to be a security even though the contract contained a guaranteed minimum feature;

(5) *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967), holding a withdrawable capital share in a savings and loan association to be a security; and

(6) *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837 (1975), holding an interest in a low income cooperative housing project not to be a security because of the absence of any profit element, but stating that the touchstone of an investment contract is "the presence of an investment in a common enterprise *premised on a reasonable expectation of profits to be derived* from the *entreprenurial or management efforts* of others." *Id.* at 852.

Certainly, an investment in a pension fund is no more novel a security than an interest in an orange grove, oil lease program, or variable annuity contract.

ticular scheme utilized to make use of other people's money has been declared a security.[20] The certiorari jurisdiction of this Court is better directed to those fewer cases in which guiding principles of law can be announced rather than to those many more cases in which previously established principles are applied.

The major argument relied on by petitioners, in fact, is *not* directed to the correctness of the decision below. In emphasis, the petitioners ignore the correctness of the decision—that plaintiff's investment in the Local 705 Pension Fund is a "security" acquired by way of a "sale"—and argue the "horribles" of the effect. Indeed, petitioners disclose the weakness of their own position by relying in essence on an emotional appeal to a doomsday argument characterized by what the courts of appeals has called a "parade of horribles." Not surprisingly, this scare tactic cannot overcome the solid judicial reasoning of the court below. More importantly, these "horribles" do not bring this case within the certiorari jurisdiction of this Court.

The first "horrible" are the vast dollar damages which would allegedly result from a finding of liability here. Petitioners are, however, misguided if they believe the extent of the remedy for their securities fraud can bring this case within the certiorari jurisdiction of the Court. The size of the damages which may be awarded in a securities case is irrelevant to the question of certiorari jurisdiction. *Wilkerson* v. *McCarthy*, 336 U.S. 53, 66-67 (1949) (J. Frankfurter, concurring). In any event, the whole question of damages is not now before the Court. Indeed, this Court has clearly held that the finding of liability in a securities fraud case is unrelated to a determination of the appropriate remedy. *Mills* v. *Electric Auto-Lite*, 396 U.S.

[20] Of course, "novel or atypical methods should not provide immunity from the securities laws." *Superintendent of Insurance* v. *Banker's Life and Casualty Company*, 404 U.S. 6, 10 n.7 (1971).

375, 386 (1970). It is for the district court at first instance to fashion an appropriate remedy where federally secured rights are invaded. *J. I. Case* v. *Borak*, 377 U.S. 426, 433 (1964).

The second "horrible" is an alleged irreconcilable conflict between the federal securities laws and the newly enacted ERISA. Here, however, petitioners are completely misguided. Petitioners inexplicably fail to note that this lawsuit involves a pre-ERISA securities fraud.[21] Because the provisions of ERISA only take effect prospectively, the plaintiff has no remedy here under ERISA. Because the provisions of ERISA only take effect prospectively, there can be no issue in this case as to the relationship between ERISA and the federal securities laws. ERISA Sections 111, 211 and 414. A determination by this Court of the nature of such a relationship must thus await some future case. Not being present here, this issue can not bring this case within the certiorari jurisdiction of the Court. In any event, as discussed below, there is no conflict between ERISA and the federal securities laws.

The third "horrible" is the alleged havoc the decision below will wreak upon the nation's collective bargaining system. Without support in either law or fact such predictions of ruin cannot withstand analysis. The decision below in no way denigrates the exclusive representative status of the collective bargaining representative. Section 9 of the National Labor Relations Act, 29 U.S.C. Section 159. The plaintiff below does not have the right to bargain individually with his employers. What he does have is the right to vote to ratify any Local 705 labor contract with covered employers. And, this right to vote arises from the Local 705 constitution and not from this lawsuit. The court of appeals has thus called petitioners' argument "specious" and concluded that:

[21] See n. 36, *infra*.

"The only negative effect on unions *qua* unions will be in preventing them from defrauding their rank and file with impunity." Pet. Local 705 App. p. 49.

The final "horrible" is the effect the decision below would allegedly have on other non-Teamster pension funds. Here, too, however, petitioners prophesize doom without support in either law or fact. To the extent that petitioners believe the decision below requires the registration of pension fund securities under Section 5 of the 1933 Act, they have made their "quintessential error." Pet. Local 705 App. p. 44. Most pension fund securities are exempted from registration by Section 3(a)(2) of the 1933 Act as amended by the Investment Companies Amendments Act of 1970; the rest are exempted by "longtime and consistent [SEC] administrative practice." Pet. Local 705 App. p. 50 n.61. "In contradistinction [to the registration requirements] the antifraud provisions do not establish an affirmative disclosure system requiring the filing of documents." *Id.* at 44. To the extent that petitioners believe most non-Teamster pension funds will be exposed to ruinous liability, they fall back on questions of remedy not now before the Court. In any event, petitioners here cannot avoid the fact that the fraud engaged in by the Teamster defendants is particularly glaring. In contrast, there is absolutely no evidence of any sort that other non-Teamster pension funds have engaged in the type of *intentional* securities fraud complained of here. *Ernst and Ernst* v. *Hochfelder*, 425 U.S. 185 (1976).

The most telling point is that petitioners concede certain employee pension plans are subject both to ERISA and the federal securities laws. Petitioners acknowledge that certain "voluntary and contributory" pension plans are subject to the antifraud rules as well as to the registration requirements of the 1933 and 1934 Acts. Notwithstanding petitioners' fears, the application of the federal securities laws to these plans has not wreaked havoc on them. Indeed, the continuing creation of such plans indicates well the

lack of any alleged burden. See Form S-8, Sec. Act. Release No. 33-5488 (1974), CCH Fed Sec. L. Rep. ¶7,197. In fact, the securities laws and ERISA have become increasingly complementary as the SEC continues its efforts to revise Form S-8 to avoid duplication of, but not defer to, the ERISA requirements. Sec. Act. Release No. 5767 (Nov. 22, 1976), CCH Fed. Sec. L. Rep. ¶80,809 at 87,110-11; *SEC* v. *Garfinkle*, CCH Fed. Sec. L. Rep. Para. 95,020 (S.D.N.Y. 1975). Petitioners have thus suggested no good reasons why the Local 705 Pension Fund should be treated any differently from such other employee pension plans.

Finally, petitioners' argument that various conflicts of decision bring this case within the certiorari jurisdiction of the Court is mistaken. There are no decisions in either this Court or other courts of appeal which hold an investment in a pension fund not to be a "security" acquired by way of a "sale" for purposes of the antifraud rules. The alleged presence of differing decisions in federal district courts in other circuits does not justify the granting of certiorari.

The decision below is, therefore, not the type of decision for which this Court should exercise its certiorari jurisdiction. No constitutional issue is involved; there is no conflict among the circuits; there is no conflict between federal statutes. All that the decision below involves is the application of a particular principle of law, the *Howey* rule, accepted as controlling by the petitioners, to a particular set of facts. And, with respect to this question, Supreme Court review is clearly premature because the decision below is on an interlocutory order. See, e.g., *American Construction Co.* v. *Jacksonville, T. and K.R. Co.*, 148 U.S. 372, 384 (1893). With or without Supreme Court review of the court of appeals decision, a trial on the remaining counts must be held on the issues raised by plaintiff's Complaint. And, indeed, if plaintiff does not

prevail on the facts at trial, ultimate review by this Court will prove unnecessary. Accordingly, the interlocutory decision below is not now ripe for review by this Court, and the expressed concern of several interested *amici* cannot make it so.

I. THE DECISION BELOW IS CLEARLY CORRECT

The Court of Appeals for the Seventh Circuit has in a closely reasoned and comprehensive opinion unanimously held that plaintiff's investment in the Local 705 Pension Fund was a "security" acquired by way of a "sale" for the purposes of the antifraud rules of the federal securities laws. See pp. 10-15, *supra*. The mode of analysis by which the court below reached this decision is in accord with that mandated by this Court. See *Ernst and Ernst, supra*. The decision is, furthermore, supported by legislative history, economic reality, and policy considerations.

A. The Presence of A Security

The first question addressed by the court of appeals was whether an interest in the Local 705 Pension Fund is a security. Sections 2(1) of the 1933 Act and 3(a)(10) of the 1934 Act. To answer this question, the court applied the *Howey* rule,[22] finding all three elements of this rule present. Petitioners attack this conclusion on the unlikely grounds that no investment has been made and no profits are expected. To so argue is to argue in the dark. To establish the first element of the *Howey* rule all that need be shown is that an investment of value by the plaintiff has taken place. Whether viewed as an investment of services direct or an investment of money through the form of employer contributions made on behalf of the employee into the Local 705 Pension Fund, such an investment has clearly

[22] *SEC* v. *W. J. Howey Co.*, 328 U.S. 293, 298-99 (1945) defines an "investment contract" as "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party."

been made. *This proposition is now universally accepted*—by Congress,[23] by the courts,[24] and by commentators.[25]

The Local 705 Pension Fund which receives the investments of the Local 705 union members constitutes without dispute the common element of the *Howey* rule. Finally, the presence of profits from the efforts of others, the third element of *Howey*, also cannot be disputed. However, petitioners attempt to discredit the profit Daniel expects to receive by claiming it derives from the forfeited pensions of other union members. This attempt must fail. First, as noted by the court of appeals and even by petitioners themselves, a substantial part of the profits from

[23] "Regardless of the form they take, the employer's share of the cost of these plans or the benefit the employers provide are a form of compensation." S. Rep. No. 1440, 85th Cong., 2nd Sess. at 4 (1958).

[24] See, e.g., *Lewis* v. *Benedict Coal Co.*, 311 U.S. 459, 469 (1969) ("another form of compensation to the employees"); *Inland Steel* v. *NLRB*, 77 NLRB 1 (1948), enforcement granted 170 F.2d 247 (7th Cir. 1948), *cert. den.* 336 U.S. 960 (1949) (realistically viewed such plans are part of the entire wage structure); *SEC* v. *Addison*, 194 F. Supp. 709 (N.D. Tex. 1961) (the investment may take the form of property or services).

[25] Former SEC Chairman Cohen has thus commented:

> "Both [an] investor [in a mutual fund] and employee [in an employee pension plan] are *investing money which they have earned*. Realistically, the employee is simply putting into a fund for his future use that which he would otherwise get in his paycheck." (emphasis added)

Hearings on S.3598 before the Subcomm. on Labor, 92d Cong., 2nd Sess. at 231 (1972) (the *"1972 Hearings"*). And, the noted commentator Peter F. Drucker has said:

> "Payments into a pension fund, whether made by employer, employee, or both, are 'deferred wages' and 'labor costs'."

The Unseen Revolution at 8 and 34 (1976). Indeed, even petitioner IBT concedes that Daniel's investment in the Local 705 Pension Fund "constitutes a form of compensation for an employee's labor." See n.13, *supra*.

an investment in the Local 705 Pension Fund derives from traditional forms of return. See p. 11 and n.14, *supra*. Second, the source of gain is irrelevant to the presence of profits. Profits exist when the return received, regardless of their source, exceeds the investment. Thus, profits are defined in *Black's Law Dictionary* at 1376 (1957):

> An excess of the value of returns over the value of advances

And, in *Webster's New Collegiate Dictionary* at 919 (1973):

> The excess of returns over expenditures in a transaction

Because the expected payout to Daniel is conceded to exceed Daniel's investment in the Local 705 Pension Fund, the profit element of *Howey* is satisfied by this fact alone.[28]

The conclusion that an interest in the Local 705 Pension Fund is a security has, moreover, the support of both legislative history and SEC interpretation. As early as 1941, both SEC commissioner Purcell[27] and the assistant general counsel of the SEC[28] noted that an interest in an

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[26] For example, in both *SEC* v. *Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir. 1974), and *SEC* v. *Glenn W. Turner, Enterprises, Inc.*, 474 F.2d 476 (9th Cir.), *cert. den.* 414 U.S. 921 (1973), the profit there present for any particular investor in the pyramid sales scheme had as its source a substantial part of the investment of another investor in the scheme. Likewise, the payout to an annuitant in *VALIC*, *supra*, was more likely to come from the investments of new annuitants than from a return to the maturing annuitant of his original investment and the income earned on it.

[27] See p. 12, *supra*.

[28] "The security which is involved within the meaning of Section 2(1) of the Act in connection with the offer or sale of interests in certain types of [employees pension] plans is normally an 'investment contract.' Frequently the interests may come also within the phrases 'certificate of interest or participation in a profit sharing agreement.'" Opinion of Ass't Gen. Counsel of SEC, [41-44 Transfer Binder] CCH Fed. Sec. L. Rep. Para. 75,195 (1941).

employee pension plan is a security. This position has been further confirmed by Manuel F. Cohen, former chairman of the SEC, who has stated categorically:

> "The first and perhaps the most important point I can make to this subcommittee [is that] . . . *Pension plans represent an investment medium. Interests in a private pension plan fall within the definition of a security under the Securities Act of 1933*, and most private pension plans would be subject to regulation under the Investment Company Act of 1940 but for a specific exemption from that statute . . ." *1972 Hearings* at 231. (emphasis added)

It is thus not surprising that this consistent interpretation[29] by the SEC has been characterized by Professors Mundheim and Henderson as that "traditionally taken" by the SEC. Mundheim and Henderson, Applicability of the Federal Securities Laws To Pension and Profit Sharing Plans, 29 *Law and Contemp. Prob.* 795, 811 (1964). Petitioners "quintessential" error in their review of the legislative history is their reliance on statements made in the context of whether all such employee pension plan interests have to be registered under the 1933 Act.[30]

Petitioners equally misread the Investment Companies Amendments Act of 1970 (the 1970 Act). There, Congress *specifically recognized* that interests in employee pension plans are securities, and, as such, provided for the exemption of certain of those securities from the registration re-

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[29] See also Chapter VII of the Summary Volume of the *Institutional Investor Study* (1971), which concludes (at p. 69) that: "interests of participants in [employee pension] plans meet the definition of 'security' under the Securities Act of 1933."

[30] For example, Commissioner Purcell has stated in the *1941 Hearings* (at 898):

> "Now, in anything I have said, I do not mean to imply that every employees' plan requires registration. . . . Even where the plan involves securities, registration is not required in many cases. . . ."

quirements of the 1933 Act.[31] Whether the employee pension plan is maintained at a bank, and thereby exempt from registration, or maintained elsewhere and not exempt, the clear Congressional implication is that interests in employee pension plans are securities not automatically exempt from registration. And, of course, exemption from registration does *not* mean exemption from the antifraud rules.

Petitioners' attempt to restrict the clear language of the 1970 Act is clearly wrong. As the court of appeals has noted:

> "Defendants . . . seek to downplay the importance of the 1970 Amendments by arguing that the 1970 exemption relates only to the sale of interests in certain bank collective trust funds and insurance company separate accounts for pension funds, claiming that the sale to employees of interests in the underlying pension funds is entirely outside the scope of the 1970 Act. However, these arguments relate to legislative history concerning an earlier version of the Act which referred only to 'collective' trust funds. A close study of the legislative history shows that the version of the Act which was finally adopted contemplated the interests sold to employees in the underlying pension fund." Pet. Local 705 App. p. 30.

The language of Section 3(a)(2) of the 1933 Act, as amended by the 1970 Act, clearly refers to "any interest or participation in a single . . . trust fund . . . which interest

[31] Section 3(a) of the 1933 Act now reads:

> Section 3(a). Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of securities: . . . (2) . . . any interest or participation in a single or collective trust fund maintained by a bank . . . which interest or participation is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under Section 401 of [the Internal Revenue Code of 1954]. . . .

or participation is issued in connection with . . . a pension plan." This is an exact description of the interest plaintiff has acquired in the Local 705 Pension Fund. Petitioners can not avoid the clear statement of Congressional intent:

> "[This section] would exempt . . . bank . . . *administered corporate pension plans* from the registration and reporting requirements of the Federal Securities Act, *but it does not exempt them from the antifraud provisions of those acts.*" (emphasis added)

Report of the House Comm. on Inters. and For. Commerce on the Investment Company Amendments Act of 1970, H. Rep. No. 91-1382, 91st Cong., 2d Sess. at 10 (1970).

B. The Presence of A Sale

The second question addressed by the court of appeals was whether plaintiff acquired his security in the Local 705 Pension Fund by way of a "sale". Petitioners' argument that no sale has occurred ignores the express words of the statute. Section 2(3) of the 1933 Act defines "sale" to include "*every* disposition of a security or interest in a security for value." (emphasis added). And, Section 3(a)-(14) of the 1934 Act does not even include the "for value" requirement, defining "sale" to include "any contract to sell or *otherwise dispose of.*" (emphasis added). Since without dispute the plaintiff has acquired an interest in the Local 705 Pension Fund, and since that interest is a security, there has been a *disposition* of this security to the plaintiff. The broad and unambiguous definition of "sale" in the 1934 Act has thus been satisfied. Moreover, the "for value" requirement of the 1933 Act definition is also satisfied, as noted above, by the plaintiff's giving of services, or, alternatively, by the contribution on plaintiff's behalf by his employer of a portion of plaintiff's economic

compensation. See pp. 22-23, *supra; Collins* v. *Rukin,* 342 F. Supp. 1282 (D. Mass. 1972).[32]

This straightforward application of the unambiguous statutory definition is not overcome by petitioners' characterization of the Local 705 Pension Fund as "non-contributory." To call a pension plan non-contributory is a misnomer if it is also to mean that members of the plan do not give value in exchange for the acquisition of securities in the plan.[33] Here, value is concededly given.

Likewise, calling the Local 705 Pension Fund "compulsory" does not overcome the unambiguous definition of sale. As this Court has clearly stated, the language of the statute governs and the words "dispose" and "disposition" are not modified by the adjective "voluntary." There is thus no "volitional" element in the definition of sale in

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[32] The court of appeals has thus concluded:

"The defendants maintain there is a controlling conceptual distinction between "non-contributory" plans and plans where the employee first receives cash and then pays over such cash into the pension fund. We refuse to subscribe to undue literalism. An employee's performance of services satisfies the for value requirement of the 1933 Act. See *Collins* v. *Rukin*, 342 F.Supp. 1282 (D.Mass. 1972); *SEC* v. *Addison*, 194 F. Supp. 709 (N.D. Tex. 1961); *Lawrence* v. *SEC*, 398 F.2d 276 (1st Cir. 1968); . . . Recent SEC interpretations also support the view that an interest in a non-contributory plan is gained for value. *Oklahoma National Gas Co.* [71-72 Transfer Binder] CCH Fed.Sec.L.Rep. ¶78,583 (1971); *Allis-Chalmers Corp.* [72-73 Transfer Binder] CCH Fed.Sec.L.Rep. ¶78,803; . . . *Missouri Research Laboratories, Inc.* [72-73 Transfer Binder] CCH Fed. Sec.L.Rep. ¶79,036." Pet. Local 705 App. p. 35.

[33] "The reality of the situation is that the employee contributes the fruits of his labor, regardless of the form of contribution. All benefit plans are compensation for employment; therefore all plans are contributory. Likewise, all employment choice is voluntary; therefore all plans are voluntary." Note, Employee Compensation Plans: The Need for Stricter Regulations, 6 *St. Mary's L.J.* 192, 204 (1974).

either the 1933 or the 1934 Act. In fact, this volition argument was impliedly rejected by this Court in *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969). And, it is as stale as old Rule 133 which was rescinded in 1972. Compare (the now rescinded) old Rule 133, 17 C.F.R. Section 230.133 (1964) with Sec. Act. Release No. 5246 (1972).

In any event, if required the volitional element has been met here either by accepting and continuing employment or by express ratification of the collective bargaining agreement which provides for investment into the Local 705 Pension Fund. As the court of appeals concluded:

> "volition is present to the extent that Local 705 members voted whether or not to accept the collective bargaining contract containing this pension fund and whether to ratify subsequent agreements governing the level of employer contributions into the fund or seek dismissal of union officers or the unlikely radical measure of decertification of the Union. Similarly, in the corporate merger context (where a vote by the shareholders to merge is binding notwithstanding any individual shareholder's vote to the contrary), cases under the anti-fraud provisions have held that a sale occurs where there is no voluntary action by the alleged purchaser. *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627, 635 (2d Cir. 1967); *Zeller* v. *Bogue Electric Manufacturing Corp.*, 476 F.2d 795 (2d Cir. 1973); *International Controls Corp.* v. *Vesco*, 490 F.2d 1334 (2d Cir. 1974), certiorari denied, 417 U.S. 932." Pet. Local 705 App. p. 36.

The decision below is in fact a narrow opinion. It merely applies long established definitions under the federal securities laws to a particular set of facts. Indeed, the facts themselves are not really novel for all parties to the case concede that interests in certain employee pension plans are securities subject to the antifraud rules. The petitioners have not given any good reasons why an investment in the Local 705 Pension Fund should be treated any differently. Neither have the petitioners established a conflict between the decision below and the prior six

Supreme Court cases interpreting the definition of "security" under the federal securities laws. There is no need now for a seventh opinion on the same question.

II. THE PARADE OF HORRIBLES DO NOT BRING THIS CASE WITHIN THE CERTIORARI JURISDICTION OF THE COURT

The thrust of petitioners' confusing arguments is that somehow the effects of the decision below are so horrible as to bring this case within the certiorari jurisdiction of the Court. A doomsday argument is, of course, a mainstay of any defendant's brief. However, this doomsday argument has been duly considered by the court of appeals on its merits and unanimously rejected:

> "The parade of horribles offered by defendants and the *amici* who support their position (including their predictions of $200 billion liabilities) results mainly from their zeal as advocates and should not distract a court from enforcing the Congressional policies contained in the anti-fraud provisions of the securities laws. Finally, we wish to emphasize that we are not holding the registration requirements of the 1933 Act or the reporting requirements of the 1934 Act to be applicable to these pension funds. We do not require the filing of any document or establish judicial control over pension fund operations. There should be no undue burden caused by the type of disclosure the anti-fraud provisions would encourage because all of the material information will be readily available to the plan trustees since their actuaries needed all of the information in order to set up the plan in the first place." Pet. Local 705 App. pp. 49-50.

A. The Question of Damages Is Not Now Before The Court.

Petitioners most incredible argument is the doomsday prophecy that application of the securities antifraud rules will result in "vast retroactive liabilities." Pet. IBT at p. 11. The size of this king's ransom is estimated by *amicus* to be 200 billion dollars ($200,000,000,000). ERISA Industry Committee *amicus* brief before the court of appeals at p. 29. As might be expected with such an incredulous figure, petitioners' apprehension of disaster rests on a misconception of this case and of the federal securities laws. More importantly, the size of damages which may be awarded in a securities case is irrelevant to the question of certiorari jurisdiction. *Wilkerson* v. *McCarthy*, 336 U.S. 53, 66-67 (1959) (J. Frankfurter concurring) ("importance of the outcome merely to the parties is not enough" to warrant granting certiorari).

Petitioners are, in fact, rather presumptuous to set out at this stage of the litigation their own preferred remedy for their own securities fraud, and then to object to the arithmetic consequences. Indeed, the issue of what is an appropriate remedy for petitioners' fraud is not before the Court. Rather, the question presented is *solely* whether the antifraud rules of the federal securities laws are applicable to the fraudulent sale to plaintiff of a security in the Local 705 Pension Fund. The question of damages is for the district court to decide.[34] This is particularly so

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[34] Petitioners' implication that a proper remedy here for their securities fraud would endanger the pensions due presently vested Local 705 members is also both wrong and irrelevant. It is wrong because vested union members should not benefit from fraud perpetrated against fellow employees. It is irrevelant because this case involves "no issue of priority of claims" against the Local 705 Pension Fund. Indeed, this Court has rejected just such an argument:

> "The respondents have argued that we should not declare the petitioners' withdrawable capital shares securities under § 3(a)(10) because the petitioners, if they are successful in their suit for rescission, will gain an unfair advantage over other investors in City Savings in the distribution of the limited assets of that Association, which is now in liquidation. *This argument, at best, is a non sequitur. This case in its present posture involves no issue of priority of claims against City Savings.* This case involves only the threshold question of whether a federal court has jurisdiction over the complaint filed by the petitioners—a

(footnote continued)

here where the decision below is on an interlocutory order denying defendants' motions to dismiss. This Court in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 386 (1970), has stated quite clearly that a finding of liability is unrelated to a determination of the appropriate remedy:

> "Our conclusion that petitioners have established their case by showing that proxies necessary to approval of the merger were obtained by means of a materially misleading solicitation *implies nothing about the form of relief to which they may be entitled.* We held in *Borak* that upon finding a violation the courts were 'to be alert to provide such remedies as are necessary to make effective the congressional purpose,' noting specifically that such remedies are not to be limited to prospective relief." (Emphasis added)

See *J.I. Case* v. *Borak*, 377 U.S. 426, 433 (1964). Also directly in point is *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228, 241 (2d Cir. 1974), where the second circuit stated:

> "Finally, having held that all defendants violated Section 10(b) and Rule 10b-5 and that they are liable to plaintiffs in this private action for damages, we leave

(footnote continued)

> question which turns on our construction of the term 'security' as defined by § 3(a)(10) of the Securities Exchange Act of 1934. It is totally irrelevant to that narrow question of statutory construction that these petitioners, if they are successful in their federal suit, might have rights in the limited assets of City Savings superior to those of other investors in the Association." (Emphasis added)

Tcherepnin v. *Knight*, 289 U.S. 332, 346 (1967). The court of appeals has thus noted:

> "Furthermore, as *amicus* Institute for Public Interest Representation has shown, current employees need not be disadvantaged because of the generous amortization and waiver provisions contained in Sections 302, 303 and 304 of ERISA. . . . It is for the district court to construct a remedy which properly balances the needs of plaintiff against those of other fund participants." Pet. Local 705 App. p. 49.

> to the district court the appropriate form of relief to be granted, including the proper measure of damages. This comports with the procedure followed in other cases where appellate courts have determined issues of liability for violations of the securities laws. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 386-89 (1970); *J. I. Case* v. *Borak*, 377 U.S. 426, 433-35 (1964);
> . . .
> In the instant case there are *especially compelling reasons for following this procedure. Since the appeal comes to us from an interlocutory order denying defendants' motion for judgment on the pleadings, there was no issue before the district court and of course no adjudication below on the form of relief to be granted.*" (Emphasis added)

Thus, it is for the district court, at first instance, to fashion a remedy so as to grant the necessary relief where federally secured rights are invaded.

Petitioners' financial doomsday argument is not only improper, it is also just plain wrong. The 200 billion dollar liability prophesized is absurd. Petitioners ignore the fact that this lawsuit involves not a breach of the 1933 Act registration requirements, but a violation of the antifraud rules. The decision below expressly does not find the registration requirements of Section 5 of the 1933 Act applicable here:

> "Finally, we wish to emphasize that we are not holding the registration requirements of the 1933 Act or the reporting requirements of the 1934 Act to be applicable to these pension funds. We do not require the filing of any document or establish judicial control over pension fund operations." Pet. Local 705 App. p. 49-50.

The sale of securities by most pension funds—estimated by the court of appeals to be as high as 96 percent, *Id.* at p. 50 n.61—are exempted from the registration requirements by Section 3(a)(2) of the 1933 Act. And, those not exempted by Section 3(a)(2) "might be deemed beyond the scope of the registration requirements . . . because of . . . longtime and consistent [SEC] administration practice." *Id.* Furthermore, what is considered a "sale" for purpose of the

antifraud rules is not necessarily a "sale" for purposes of the registration requirements. For example, in *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969), this Court held that a corporate merger involved a "sale" for purposes of the antifraud rules, notwithstanding the existence of a SEC rule providing that no "sale" was involved for purposes of the registration requirements. See, e.g., *Exchange National Bank of Chicago* v. *Touche Ross & Co.*, [76-77] CCH Fed. Sec. Law Rep. ¶95,614 at p. 90,064 (2d Cir. 1976) ("the purposes of the registration and antifraud provisions differ. . .").

In any event, the extent of any liability for pension fund securities fraud is limited by the applicable statute of limitations, the requirement of scienter, the extent of plaintiff's knowledge, and remedy considerations. The decision below is restricted to the particular facts of a Teamster union multi-employer pension fund. It is not necessarily applicable to a non-union corporate employee pension fund which may have characteristics unlike those of the Teamsters pension fund here involved. These limitations have been expressly recognized by the court of appeals:

> "Moreover, plan liability, given the fact that employees' interests in pension funds are covered by the anti-fraud provisions of the securities acts, is still limited by a number of factors. Particular employees must show, in light of all the ambient circumstances, justifiable reliance on a material misrepresentation or omission causing them injury. If all material facts are disclosed in a manner comprehensible to the average worker, as in any other securities fraud case, no damage causation will exist under the securities laws. . . . Thus if the plan documents sent to a plan beneficiary understandably disclose this information, a retiree who does not meet the vesting requirements will have no remedy under the securities acts, even if he subjectively did not comprehend the disclosed information. In addition, other pension funds may be immunized by the applicable statute of limitations. These considerations, as well as others, may arise here and in future cases as constraints on plan liability." Pet. Local 705 App. pp. 50-51.

The securities fraud engaged in by the Teamster pension funds has been particularly egregious. The fraud complained of involves not merely the omission to disclose one particular fact, but the whole complex scheme whereby the Teamster defendants have conspired to cause the Teamster rank and file to invest their savings in Teamster pension funds substantially more attractive in appearance than in reality.[35] The Teamster pension funds stand out because they typify the whole host of abuses that can develop when one has the use of other people's money. L. Branders, *Other People's Money* (1914). They stand out because the abuses engaged in are particularly glaring. They stand out because of the *scienter* underlying the fraud perpetrated against the rank and file. Petitioners' implied assertions that all, or even most, other pension funds are sold by means of an *intentional* securities fraud simply have no basis in fact. Following *Ernst and Ernst*, the negligent or innocent misrepresentation or omission to state a material fact about a pension fund security is not grounds for a cause of action under Sections 17(a) and 10(b) of the 1933 and 1934 Acts respectively.

Finally, petitioners fail to note that this lawsuit involves a pre-ERISA securities fraud.[36] Assuming, *arguendo*, that ERISA somehow pre-empts the federal securities laws, petitioners still would be unable to avoid liability under the

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[35] See generally pp. 5-7 and n.10 and n.11, *supra*.

[36] The plaintiff invested in the Local 705 Pension Fund on the fraudulent inducement of defendants over the period from April, 1955, through November, 1973. In contrast, ERISA was enacted on September 2, 1974, and its provisions *only* take effect prospectively. ERISA Sections 111, 211, and 414; See, e.g., ERISA Section 203(b)(1)(F).

antifraud rules because the provisions of ERISA only take effect prospectively. To apply the shield of ERISA pre-emption retroactively would be to deny plaintiff relief both under the federal securities laws and under ERISA. This Congress did not intend. Petitioners' argument based on ERISA is, therefore, of no use to them. However, the adoption of petitioners' ERISA pre-emption argument would provide a shield from liability for pension fund securities fraud *subsequent* to the enactment of ERISA. In this way, too, the extent of any liability for pension fund securities fraud would be limited.

B. There is No Conflict with ERISA

Petitioners place their primary reliance on ERISA as a shield from liability for their intentional securities fraud. This reliance is completely misplaced. There is no conflict between ERISA and the court of appeals decision below. As noted, this case involves a pre-ERISA securities fraud. Petitioners thus must fail in their effort to use ERISA to bring this case within the certiorari jurisdiction of the Court. Moreover, even were ERISA applicable here, it would not immunize petitioners from liability under the antifraud rules of the federal securities laws.

There is nothing in the language of ERISA to support the conclusion that ERISA was intended to pre-empt the antifraud rules of the federal securities laws. *To the contrary*, Section 514(d) of ERISA, for our purposes, *specifically saves* all other legislation:

> Nothing in [ERISA] . . . shall be construed to alter, amend, modify, impair, or supersede, any law of the United States . . . or any rule or regulation issued under any such law.

In addition, not only does ERISA not pre-empt the federal securities laws, it also does not pre-empt state securities laws. The ERISA provisions pre-empting all state laws relating to employee benefit plans expressly do not pre-

empt state securities laws relating to employee benefit plans. Section 514(b)(2)(A) states: "Nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates . . . securities."

Not only the express language of ERISA, but also its legislative history supports the conclusion that ERISA was not designed to pre-empt the federal securities laws. This legislative history makes plain the Congressional understanding that interests in employee pension plans are "securities"—in most cases exempt from registration under the 1933 Act. See Pet. Local 705 App. pp. 43-44. In any event, Congressional intent in the securities law area is best seen by looking directly to the federal securities laws, including the recent Investment Companies Amendments Act of 1970, all of which is specifically saved by ERISA.

In fact, only when both ERISA and the antifraud rules of the federal securities laws apply to employee pension plans does the regulatory pattern make good common sense. ERISA contains, for example, specific provisions regulating the funding of employee benefit plans, establishing a plan termination insurance program, and outlining a voluntary program for the portability of vested pension benefits. As such, ERISA is designed to cure a variety of abuses in the pension area, including primarily those dealing with the ongoing administration of employee pension funds. However, ERISA does not mandate full and fair disclosure to an employee *prior* to his making an investment in an employee pension plan. ERISA *does not regulate the circumstances of entry* into an employee pension plan. Instead, ERISA mandates minimum standards relating to the *operation* of an employee pension plan. The substantive regulation of an industry by one statute (viz., ERISA) together with the regulation of the sale of securities by issuers in that industry by another statute (viz., the federal securities laws) makes good sense. *It is not unusual in our federal*

scheme.[37] The question of overlapping jurisdiction of employee pension plans was specifically recognized by Congress and dealt with in the Investment Company Amendments Act of 1970.

The plaintiff here has no remedy under ERISA because he was injured by a pre-ERISA securities fraud. More importantly, he would have no remedy under ERISA even were ERISA applicable. Indeed, this has not been disputed by petitioners, and it is recognized by the court of appeals. "*There is no provision of Title I [of ERISA] which generally prohibits the making of false or misleading representations to an employee concerning the pension fund.*" Pet. Local 705 App. p. 46 n.57 (emphasis added).

Disclosure under the federal securities laws differs in content and timing from ERISA disclosure. For example, under the federal securities laws disclosure of all material facts, when required, must be made prior to or at the time an investment decision is taken and a security purchased. In contrast, the disclosure required by ERISA is limited to the substantive plan provisions and need only be made 90 days *after* an employee becomes an investor in an employee pension plan. ERISA Section 104(b)(1)(A). The court of appeals has thus concluded:

> "The anti-fraud provisions of the securities acts will protect the interests of an investor before he makes an investment decision, while ERISA serves employees who have been employed for a substantial period of time at a job covered by a pension plan,

[37] For example, the Investment Company Act of 1940 provides for the substantive regulation and administration of mutual funds—while the sale of mutual fund securities still must comply with the disclosure and antifraud rules of the 1933 and 1934 Acts. In like fashion, although banks are subject to extensive state and federal substantive regulation, bank securities are still securities subject to the antifraud rules, even though exempt from registration. *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967).

> protecting them from losing benefits through ignorance of the plan provisions. Consequently, we conclude it would be unwarranted to impute an intent on the part of Congress for ERISA to override the federal or state securities laws, *SEC* v. *Garfinkle* [74-75 Transfer Binder] CCH Fed.Sec.L.Rep. ¶95,020 (S.D.N.Y. 1975), where protections offered by ERISA do not fully overlap those of the antifraud provisions of the securities acts." Pet. Local 705 App. p. 47.

The effective application of both the federal securities laws and ERISA to employee pension plans will in no way impede or interfere with either statutory scheme. They work together.

III. THERE IS NO CONFLICT OF DECISION

There is no conflict of decision between the decision of the court of appeals below and any other decision of this Court or any other courts of appeal. Petitioners' respective assertions of the type of conflict necessary for certiorari are thus misguided. There are *no* decisions in either this Court or other courts of appeal which hold an interest in a pension fund not to be a "security" acquired by way of a "sale" for the purposes of the antifraud rules of the federal securities laws.

One of the prime purposes of certiorari jurisdiction is the attempt to bring about uniformity of decisions on a matter among the federal courts of appeal—those courts where decisions are otherwise final in the absence of Supreme Court review. A conflict between decisions of courts of appeals will thus often justify the granting of certiorari. Here, there is concededly no such conflict. A conflict of decisions between circuits also helps to frame the issues for review by this Court. Not only are the issues in *Daniel* thereby not ripe for review due to the lack of circuit conflict, but also these issues are not ripe in the context of *Daniel* itself because of the interlocutory nature of the decision. See pp. 47-48, *infra*.

The presence of differing decisions in federal district courts in other circuits will thus not justify the granting of certiorari. Rule 19(1)(b) of the Supreme Court of the United States. Petitioners' reliance on such district court decisions elsewhere is, therefore, misplaced.[38] In addition

[38] In any event the district court cases cited by petitioners provide no support for petitioners' position because they are either inapposite or conclusory. For example, *Hurn* v. *Retirement Trust Fund*, 434 F. Supp. 80 (C.D. Cal. 1977), can provide no support for petitioners because only two sentences in *Hurn* are directed to the issues decided in *Daniel*, and such two sentences are strictly conclusory, with no reasons or analyses given. And, *Wiens* v. *International Brotherhood of Teamsters*, BNA Sec. Reg. and L. Rep. No. 397 (C.D. Cal. 1977), provides no support because, as a ruling from the bench, it likewise is merely a conclusory opinion. See Pet. Local 705 App. p. 39 n.43. Both *Hurn* and *Wiens* were thus not followed by the court below. *Id.*

Robinson v. *United Mineworkers of America*, 435 F. Supp. 245 (D.D.C. 1977), similarly provides no support for petitioners because it is inapposite. There, surviving spouses and dependents of deceased coal miners sought an order declaring their right to permanent health care coverage by the defendant United Mine Workers of America Health and Retirement Funds. In holding that plaintiff's interest in such Health Funds was not a "security", the court in *Robinson* expressly stated that: "*Daniel* is distinguishable from the instant case." 435 F. Supp at 246, n. 1. Given this recognition by the *Robinson* court itself, it is surprising that petitioners do not themselves see the distinction. In *Robinson*—and unlike *Daniel*—the plaintiffs as spouses and dependents of the deceased coal miners could:

> "in no sense . . . be viewed as investing in the [Health Funds] . . . since they contributed nothing to the employers in return for the employers' payment of per-tonnage royalties into the [Health Funds] . . . on behalf of and in return for the services of the union miners. The *Robinson* plaintiffs were donees instead of purchasers." Pet. Local 705 App. p. 20.

More importantly, *only* the length of time health care coverage was to be extended to the plaintiffs was in issue in *Robinson*.

> "That case therefore involved merely the consumption of 'free'

(footnote continued)

to such district court decisions, petitioners also seek without success to establish a conflict between *Daniel* and other circuit court decisions and certain decisions of this Court. For example, petitioner Local 705 cites four completely irrelevant cases *interpreting completely different statutes* in its vain effort to locate a conflict.[39] In citing these cases, petitioner ignores the statutory definition of "security" and "sale" under the federal securities laws, and the mandate of this Court that "the starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (J. Powell concurring). *Other statutes are irrelevant to this inquiry*:

(footnote continued)

> medical care rather than, *as in Daniel, an actual dollar financial return on investment*, i.e., 'an expectancy of dollar benefits', *which the investor could then use to purchase anything* he chose." Pet. Local 705 App. p. 21. (emphasis added)

In contrast to *Hurn*, *Wiens* and *Robinson*, the recent district court decision in *Schlansky* v. *United Merchants & Manufacturers, Inc.*, No. 76 Civ. 5799 (S.D.N.Y. Nov. 10, 1977) is both directly in point and rigorous in its analysis. There, following the decision in *Daniel*, the court held that an interest in the United Merchants Pension Plan was "an investment contract as defined in *Howey* . . . acquired in a sale and subject to the anti-fraud provisions of both the 1933 and 1934 Acts." *Id.* (mem. opinion pp. 9-11).

[39] For example, *Joint Industry Board* v. *U.S.*, 391 U.S. 224 (1968), and *U.S.* v. *Embassy Restaurant*, 359 U.S. 29 (1959), hold that unpaid pension contributions in the hands of a bankrupt are not entitled to priority as "wages" under the Bankruptcy Act; *SIPC and SEC* v. *Morgan, Kennedy & Cox, Inc.*, 533 F.2d 1314 (2d Cir. 1976) holds that certain beneficiaries of a profit sharing trust are not "customers" of a bankrupt broker-dealer under the Securities Investor Protection Act; and *Alabama Power Co.* v. *Davis*, ... U.S. ....., 52 L.Ed. 2d 595 (1977), holds that a returning veteran is entitled to a pension as a benefit to be included within the rights of "seniority" secured by the Military Selective Service Act.

> "The Local defendants attempt to erect a dichotomy between wages *per se* and the fringe benefits of employment which together make up an employee's total compensation by referring to sections of the Bankruptcy Act, the Internal Revenue Code, the Social Security Act, the Fair Labor Standards Act and the Sherman Act which purportedly raise such a distinction for the purposes of those Acts. *The existence of a wage/compensation dichotomy in other unrelated statutes is wholly irrelevant to whether a union member has made an investment under the Howey rule.*" Pet. Local 705 App. 16 (emphasis added).

Finally, petitioners seek also without success to establish a conflict between *Daniel* and three recent decisions of this Court interpreting the federal securities laws. In *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), an offeree declined to purchase certain securities because of the defendant-offeror's alleged misleading statements. There, this Court decided against expanding the scope of persons protected by Rule 10b-5 to frustrated buyers and, therefore, beyond the scope of the purchaser-seller requirement of *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952). *Blue Chip Stamps* thus is not in conflict with the decision below because the plaintiff, John Daniel, as a purchaser of securities, clearly falls within the *Birnbaum* rule. The decision below does not expand the class of persons protected by the antifraud rules of the federal securities laws beyond that allowed by *Blue Chip Stamps* and *Birnbaum*.[40]

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[40] The other elements of *Blue Chip Stamps* also provide no support for petitioners. Respondent rejects petitioners' allegations and asserts that the instant lawsuit can in no way be construed as "vexatious" or as a "strike suit". The fraud of petitioners here is particularly egregious because of its continuing nature: even now, over three years from the filing of the Complaint, petitioners have failed to disclose the material facts attendant to an investment in

(footnote continued)

The recent case of *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976), also provides no support for petitioners. There, this Court concluded that "scienter" was an essential element of a private cause of action for damages under Section 10(b), and Rule 10b-5 promulgated thereunder, of the 1934 Act. *Ernst & Ernst* is thus not in conflict with the decision below because plaintiff's Complaint is based on defendants' fraudulent *and intentional* misrepresentations and omissions of material fact relating to the sale to plaintiff of an interest in the Local 705 Pension Fund. Indeed, the securities fraud here engaged in by the International Brotherhood of Teamsters is particularly egregious because of its continuing nature, the unique risk of wholesale loss in a Teamster pension fund,[41] and the Draconian

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(footnote continued)

the Local 705 Pension Fund. Petitioners thus cannot be allowed to turn their continuing fraud into a shield from liability under the federal securities laws.

The concern of *Blue Chip Stamps* over the problems of proof which would result from the abandonment of the *Birnbaum* rule also provides no support for petitioners because the *Birnbaum* rule was not breached by the decision below and because proof of the fraud here may be established by independent documentary evidence. The problems of proof of concern to this Court in *Blue Chip Stamps* relate to the burden of showing that an offeree did not rely on a misleading statement in deciding *not* to purchase a security. *Blue Chip Stamps*, 421 U.S. at 745-47. Because a security was *not* purchased, if *Birnbaum* were *not* followed, a whole universe of investors would have standing and of necessity only oral testimony could be relied on:

> "Plaintiff's proof would not be that he purchased or sold stock, a fact which would be capable of documentary verification in most situations, but instead that he decided *not* to purchase or sell stock." *Id.* at 746.

Here, Daniel's purchase of an interest in the Local 705 Pension Fund is subject to independent documentary verification.

nature of the vesting requirements. The materiality of the undisclosed facts is glaring.

In fact, it is just this element of scienter which distinguishes the Teamster pension funds from other pension funds. Had the defendants been truthful in their disclosures to plaintiff, there would be no lawsuit. Their fraud is singular and unique. The Teamster pension funds have been established and marketed to Teamster rank and file investors by defendants with the knowing intent to defraud most of the Teamster rank and file out of their entire investments. Plaintiff knows of no other pension fund in the country where such securities fraud has been practiced on its investors. The Teamster funds stick out like a sore thumb.

Finally, the *Daniel* decision is not in conflict with the recent case of *United Housing Foundation, Inc.* v. *Forman,*

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[41] For example, one highly reputable financial newspaper has characterized the risk of loss of an investment in a Teamster pension fund as follows:

> "As of Feb. 29, 1972 . . the [Teamster's Central States, Southeast and Southwest Areas Pension Fund] . . . listed total assets of $917.9 million, of which $819 million, or 89% was either already invested or firmly committed to real estate loans—against less than 5% for the average similar fund, according to a survey in 1973 by the Securities and Exchange Commission. . . . Morever, it wasn't all prime real estate. For one thing, much was invested in second and even third mortgages. . . . As of 1972 at least, it wasn't coming up roses, not for the half million Teamsters relying on the fund for their retirement income, anyway. The fund records state that real estate deals accounting for 30% of these mortgage loans were delinquent, not including properties acquired by the fund from borrowers, presumably in lieu of payment. With these properties thrown in, it appears that some 36.5% of the real estate loans were coming a cropper. *Wall St. J.*, Thursday, July 22, 1975."

See generally PROD. *Teamster Democracy & Financial Responsibility* (1976).

421 U.S. 837 (1975). In *Forman* the court applied the economic reality test to hold that an interest in a state subsidized and supervised non-profit housing cooperative is not an "investment contract" and thus not a security under the federal securities laws. *Forman* is thus inapposite because it does not involve the entrusting of money to others to manage with the expectation of profits. Neither does it involve a multi-employer union pension fund. In finding the interest in *Forman* not to have the requisite profit element needed for an investment contract, the Court emphasized:

> "The Bulletin [explaining the housing co-operative] repeatedly emphasizes the 'nonprofit' nature of the endeavor. . . . It also informs purchasers that they will be unable to resell their apartments back to Riverbay [the co-operative] at a profit since the apartment must first be offered back to Riverbay 'at the price . . . paid for it.'"

Id. at 854. The Court continued by stating: "In short, the inducement to purchase was solely to acquire subsidized low cost living space; it was not to invest for profit." *Id.*

Nothing could be further from the facts in the instant case. As the court of appeals noted below, the requisite profit element is present here in its *traditional forms*. Pet. Local 705 App. pp. 17-19. This is conceded by petitioners. See pp. 10-11 and n. 14, *supra*. In addition, Daniel purchased his security in the Local 705 Pension Fund not with "the desire to use or consume the item purchased," *Id.* at 852, but with the expectation of substantial profit to be returned to him, together with his initial investment, in the form of retirement benefits.

Petitioner IBT's reading of *Forman* thus is misguided. It is, for example, clear from this Court's decision in *Superintendent of Insurance,* 404 U.S. 6 (1971), that Sec-

tion 10(b) is not limited to transactions on the organized markets.[42] It is clear from this Court's decision in *SEC* v. *W. J. Howey, supra,* that a security need not be evidenced by a formal certificate. *Id.* at 299. And, it is clear from this Court's decisions in *Valic* and *United Benefit Life Insurance* that the security involved can be separated from other aspects of the transaction. In *Valic* and *United Benefit Life Insurance,* for example, the Court separated the conventional life insurance attributes from the security involved.[43] So here, the employment relationship entered into by plaintiff is separate from the security he has purchased. There is no reason why plaintiff cannot be both an investor and an employee. Indeed, other courts have found no problem with this. *Collins* v. *Rukin,* 342 F. Supp. 1282 (D. Mass. 1972); *SEC* v. *Addison,* 194 F. Supp. 709 (N.D. Tex. 1961); *SEC* v. *Koscot Interplanetary, Inc., supra,* at 476 ("case law countenanced the fragmented approach"). And, certainly, those employees who invest in employee pension plans *which concededly involve securities* subject to the 1933 Act registration requirements *are both employees and investors.* See n. 18, *supra.*

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[42] "Section 10(b) bans the use of any deceptive device in the 'sale' of any security by 'any person'. And the fact that the transaction is not conducted through a securities exchange or an organized over-the-counter market is irrelevant to the coverage of Section 10(b)." *Superintendent of Insurance, supra,* at 10.

[43] "We do not agree with the Court of Appeals that the 'Flexible Fund' contract must be characterized in its entirety. Two entirely distinct promises are included in the contract . . ." *United Benefit Life Ins.* at 207.

IV. THE INTERLOCUTORY DECISION BELOW IS NOT NOW RIPE FOR REVIEW

The interlocutory decision of the court of appeals below affirming the district court's denial of petitioners' various motions to dismiss was rendered pursuant to the Interlocutory Appeals Act, 28 U.S.C. Section 1292(b). As such, it is a *nonfinal judgment.* If certiorari is not granted, the case will be remanded to the district court for trial.[44] At trial, the plaintiff must prove up the various elements which make up a violation of the antifraud rules of the federal securities laws. The court of appeals has expressly recognized this. Pet. Local 705 App. pp. 50-51. See pp. 34-35, *supra.*

The decision of the court of appeals is thus not now ripe for review. See *American Construction Co.* v. *Jacksonville, T. & K. R. Co.,* 148 U.S. 372, 384 (1893) ("This court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment."); *Cobbledick* v. *United States,* 309 U.S. 323, 324-25 (1940); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916) (lack of finality "of itself alone furnished sufficient ground for the denial"); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.,* 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). This is particu-

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[44] Indeed, even if the conrt of appeals had reversed the district court's denial of petitioners' motions to dismiss, the case would have been remanded to the district court for trial on the remaining federal causes of action not in issue on this appeal. It is thus clear that a reversal of the court of appeals decision by this Court on certiorari will not help lighten the federal docket.

larly the case here where a trial must in any event be held by the district court, even were the court of appeals decision reversed. See n. 44 *supra*. An immediate review of the court of appeals interlocutory decision will therefore neither add to judicial economy nor increase judicial efficiency.

A trial on the issues presented in this lawsuit will help frame such issues for any ultimate review—or, indeed, *make any such ultimate review unnecessary*. For example, it is possible that the plaintiff will be unable to meet his burden of proving that defendants acted with scienter as required by *Ernst & Ernst, supra*. Or, plaintiff might be unable to avoid the statute of limitations bar. Any such finding of fact would prevent plaintiff from recovering under the antifraud rules of the federal securities laws. In that event, the questions presented by petitioners in their writs for certiorari would be moot. Accordingly, the interlocutory decision below is not now ripe for review by this Court.

CONCLUSION

For all of the reasons set forth above, we respectfully submit that the petitions for writs of certiorari should be denied.

Respectfully submitted,

PETER J. BARACK
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Attorneys for Respondent
John Daniel

APPENDIX

APPENDIX

Affidavit of John B. Daniel

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title Omitted]

JOHN B. DANIEL, being first duly sworn under oath, does hereby state as follows:

1. I am a resident and citizen of the State of Illinois, and now reside at 1355 N. Paulina Street, Chicago, Illinois.

2. My highest educational level was the completion of elementary school, Wells School in Chicago. I began working at the age of 12, in a box factory operating a nail machine. Later I worked in a packing house involved in sausage making. I served 3 or 4 years in the U. S. Army infantry, serving in the European theater in combat in World War II.

2. I first became a member of Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (Local 705) in April of 1950. At the same time, I entered employment as a truck driver with an employer who had entered into a collective bargaining agreement with Local 705.

3. I continued in employment as a truck driver with Local 705 contracting employers continuously from April, 1950, through November, 1973. At no time

during that 22½ year period did I ever work for a trucking employer who had not entered into a labor contract with Local 705. On December 1, 1973, at age 63, I retired from employment because of an extreme vision problem caused by cataracts which would not permit safe driving over long periods of time. Since my retirement, I have not worked at all.

4. In December, 1960, I was working as a truck driver for Rohde Transfer Company, an employer who had entered into a collective bargaining agreement with Local 705. On December 5, 1960, because of economic conditions, and without any fault on my part, I was laid off involuntarily by Rohde Transfer Company. This involuntary lay off continued until I was called back by Rohde Transfer Company in April, 1961. I tried unsuccessfully to find any trucking work during this period of time.

5. Subsequent to my returning to work for Rohde Transfer Company and for an approximate four month period, April to July 5, 1961, the bookkeeper for Rohde Transfer Company embezzled certain funds, including all those monies which should have been remitted to Local 705 on my behalf as employer contributions to the Local 705 Pension Trust Fund on account of my employment. Upon learning of this financial embezzlement after the bookkeeper was fired, I reported what had happened and its effect on me to Local 705. At that time I was told by Local 705 that they would take care of whatever had to be done on account of the embezzlement.

6. In 1955, I was notified by a letter sent by an officer of Local 705 to all Local 705 members that Local 705 had established a pension fund for its members who worked for employers who had entered into

labor contracts with Local 705. At that time, and at all times thereafter, I understood and believed that a Local 705 member would be eligible to receive a retirement benefit upon completing 20 years of employment with Local 705 covered employers. I also understood and believed that any years of service with a Local 705 covered employer prior to the establishment of the pension plan would count towards the 20 year requirement. I further understood and believed that all employer contributions on my behalf to the Local 705 Pension Trust Fund would be to my benefit, to finance, in part, the retirement payments which I would receive upon retirement after 20 years of employment.

7. Because of my limited educational background and my concern for financial security in my old age, the pension plan adopted by Local 705 on my behalf and on behalf of my colleagues was a material factor in my continuing in employment with Local 705 covered employers. Had I known of the way in which Local 705 and the Local 705 Pension Plan Trustees would interpret the eligibility requirements for a retirement benefit, I would have sought employment (and, if necessary, retraining for new employment) elsewhere—with retirement benefits of the type I understood Local 705 to be offering.

8. Over the period from the establishment of the Local 705 pension plan to my retirement in December, 1973, I received various communications, both through the mails and otherwise, from Local 705, the Officers of Local 705, the Local 705 Pension Trust Fund, and the Trustees of Local 705 Pension Trust Fund, pertaining to and describing the Local 705 pension plan. Those communications included

such items as various letters and booklets. After receiving all such communications it remained my understanding and belief that I would receive a pension were I to complete 20 years of employment with Local 705 covered employers.

9. In June, 1971, I received a letter from Local 705 and Louis F. Peick, Secretary-Treasurer of Local 705, describing the pension benefits to be received as follows:

"Years of Covered Service	*Age at Retirement*	*Monthly Pension*
20	57	$250.00
20	58	300.00
20	59	350.00
20	60 or over	400.00"

Because I planned to retire sometime after reaching age 60 and because at such time I would have more than 20 years of covered service or employment with employers who had entered into collective bargaining agreements with Local 705, I expected to receive on retirement a pension of $400 per month or more.

10. The various communications which I received from Local 705, the Officers of Local 705, the Local 705 Pension Trust Fund, and the Trustees of the Local 705 Pension Trust Fund, all stressed that the Local 705 Pension Trust Fund had been established for the retirement benefits of Local 705 members. For example, a 1958 booklet stated: "The purpose of these Funds is to take care of you and your family in case of retirement." And, a 1969 booklet stated: "*These funds afford protection to you and your wife and unmarried children under eighteen years of age.*" Over the years I have relied on such assurances that the Local 705 Pension Trust Fund would provide for my financial security in my old age.

11. At no time have I ever been told by Local 705, the Officers of Local 705, the Local 705 Pension Trust Fund, or the Local 705 Pension Trust Fund Trustees, or otherwise learned prior to December, 1973, that the completion of 20 years of employment with Local 705 covered employers did not satisfy the eligibility requirements of the Local 705 pension plan, or that all employer contributions made on my behalf into the Local 705 pension trust fund and all accumulated earnings on such contributions would be forfeited following a three month involuntary lay off, or that any funds have been unlawfully diverted from the Local 705 pension fund trust, or that the actuarial bases on which the Local 705 pension plan has been established is arbitrary and unreasonable, or that the actuarial likelihood that any Local 705 member will ever receive a pension benefit is relatively small.

12. At no time have I ever been told by Local 705, the Officers of Local 705, the Local 705 Pension Trust Fund, or the Local 705 Pension Trust Fund Trustees, or otherwise learned of the success or failure of the Trustees in managing the monies held in the Local 705 Pension Trust Fund. Nor have I ever learned or been told of the type of investments being made by the Local 705 Pension Trust Fund.

13. Over a period of several months prior to my retirement on December 1, 1973, I personally visited the Local 705 office from 5 to 8 times in an attempt to fill out those necessary papers and otherwise ar-

range for my pension. At no time during such visits was I ever told that I was not eligible to receive a pension.

14. After my retirement on December 1, 1973, I completed my application for a pension and was then told that I was ineligible because of a so-called "break in service" over the three to four month involuntary layoff period, December, 1960, to April, 1961. This was the first time that I was ever told that 20 years of employment with Local 705 covered employers was not enough to qualify a Local 705 member for a retirement pension.

15. After my request for a pension was denied, I asked for a review of such a decision by the Trustees of the Local 705 Pension Plan. On December 26, 1973, I appeared before the Local 705 Trustees for such review, and sometime later learned of their decision to deny my request for a pension. Thereafter, I asked for an opportunity to appear again before the Local 705 Trustees in order that they reconsider their December 26 decision. On March 28, 1974, I again appeared before the Local 705 Trustees and again requested that I receive a retirement pension. I, thereafter, learned that the Local 705 Trustees had again denied my request for a pension. (See Exhibit A).

16. Since the inception of the Local 705 Pension Plan and the Local 705 Pension Trust Fund, the retirement benefits to be provided to Local 705 members by such arrangements have at times been the subject of discussion between me and many of my fellow Local 705 members. At all such times, it was the common understanding of me and my fellow Local

705 members that a Local 705 member would receive a retirement benefit upon completing 20 years of employment with Local 705 covered employers and that no employer contributions on behalf of a Local 705 member could be forfeited. After my application for a pension with the Local 705 Pension Trust Fund was denied, I discussed this matter with other Local 705 members and they were all shocked to learn that a Local 705 member with my record of employment could be denied a pension and could be denied any and all benefit from the many years of Local 705 covered employer contributions on my behalf.

/s/ JOHN B. DANIEL
JOHN B. DANIEL